NO. 80874-1

SUPREME COURT OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES FOR THE STATE OF WASHINGTON,

Respondent.

RESPONDENT'S RESPONSE TO BRIEFS OF AMICI CURIAE

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I. RESPONSE TO BRIEFS OF AMICI

The question before this Court is whether the $25,000 limit on fees and expenses in RCW 4.84.350 applies cumulatively to all levels of a judicial review action in which a qualified party prevails. Amici argue that the $25,000 cap applies at each trial or appellate court reviewing the same judicial review action. Amici are incorrect because, notwithstanding any potential ambiguity in RCW 4.84.350(1), the statute that actually contains the award limitation language, RCW 4.84.350(2), states unambiguously that the amount awarded to "a qualified party" shall not exceed $25,000. Therefore, the award to Ms. Costanich, a qualified party, cannot exceed $25,000.

A. While awards under RCW 4.84.350(1) may be incremental and issued by multiple courts, RCW 4.84.350(2) states that the total amount awarded to a qualified party under RCW 4.84.350(1) cannot exceed $25,000.

Amici argue that the plain language of the Equal Access to Justice Act (EAJA), RCW 4.84.340-.360, allows each court reviewing the same judicial review action to award an amount up to the statutory maximum of $25,000. However, that construction is not plain, it is strained. Further, it is not supported by evidence in the legislative record, nor is it consistent with the statutory scheme as a whole. Although the superior court and the appellate court could issue separate awards of attorneys' fees and costs in the same judicial review case, the total amount of the combined awards

must be $25,000 or less. Under RCW 4.84.350(2) a qualified party prevails in a judicial review only once in the same civil action.

1. The EAJA defines judicial review to encompass all levels of review in one unified judicial review action.

Amici argue that, because an administrative action may be reviewed by a court first at the superior court and subsequently by appellate courts, each time the action is reviewed by a court constitutes another "judicial review" under the EAJA. The legislature did not define or use the term judicial review in the manner suggested by amici.

Amici adopt Ms. Costanich's analysis of the article "a," which is used several times in RCW 4.84.350(1), in order to bolster its argument for independent awards at each court level. Brief of Amicus Washington State Trial Lawyers Association Foundation (WSTLA Br.) at 6; Brief of *Amici Curiae* Northwest Justice Project, American Civil Liberties Union of Washington, Northwest Women's Law Center (NWJP Br.) at 3-4.

RCW 4.84.350(1), in its entirety, provides:

> Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

Amici, like Ms. Costanich, emphasize the use of the article "a" before the terms court and judicial review. They ignore how it is used before the term "qualified party", and fail to read the statute together with subsection(2). WSTLA Br. at 6; NWJP Br. at 6.

RCW 4.84.340(4) defines judicial review by referencing the entire Administrative Procedure Act (APA), RCW 34.05. The reference is to the entire chapter, to indicate that judicial review means the type of cases allowed by the APA. There is one judicial review action, though it may be reviewed by more than one court. For example, the *de novo* standard of appellate court review under the APA does not mean that a separate judicial review action is initiated at the appellate court.

Amici cite to *Cobra Roofing Services v. Dept. of Labor and Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006), construe judicial review to mean "each level of judicial review." NWJP Br. at 4-5. Of course, this Court in *Cobra* was addressing a completely different question, whether judicial review as defined in RCW 4.84.340(4) encompasses review before an administrative body. This Court found that it did not. *Id.* at 99-100. Amici quote this Court's "observation" that judicial review means review by a court and conclude that this "effectively settles the issue in this case." NWJP Br. at 5. The cited phrase is not a holding and does not settle – or even relate to – the issue in this case.

There is no need, nor would it be appropriate, to refer to dictionary definitions as amici invite. *See* NWJP Br. at 5. Instead, by referring to the APA civil action of judicial review, the EAJA defines judicial review to encompass all levels of a judicial review. RCW 4.84.340(4). Nor is it necessary or appropriate to turn to this Court's application of the term "a" in a criminal case addressing the proper unit of prosecution. *See* NWJP Br. at 6-7, citing *State v. Ose*, 156 Wn.2d 140, 146, 124 P.3d 635 (2005).

Contrary to the assertion of amici, construing "a judicial review" in RCW 4.84.350(1) to mean the entire action at all court levels does not read the article "a" out of the term "a judicial review." *See* NWJP Br. at 7. Rather, consistent with the legislature's citation to the entire APA, a judicial review refers to the cause of action, not a particular court's review. It is no different than if the legislature referenced a contract action which would not imply separate actions at each judicial level.

The EAJA certainly does allow multiple courts to issue awards in the same action so long as the total award to a qualified party does not exceed $25,000; but no construction of RCW 4.84.350(1) referencing "a court" and "a judicial review" changes the statutory cap on the total amount paid to "a qualified party" in RCW 4.84.350(2). Under the limitation language of RCW 4.84.350(2), although there may be multiple awards issued, the total amount awarded to a qualified party shall not exceed $25,000.

2. The statutory limit of $25,000 to a qualified party is consistent with the legislature's purpose in passing the EAJA.

The legislature stated its intention in passing the EAJA: "to ensure that . . . parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect those rights". Laws of 1995, ch. 403 § 901. The opportunity provided to recoup attorneys' fees and costs was expressly limited to twenty-five thousand dollars. While amici suggest that $25,000 does not adequately compensate a qualified party under the EAJA, even when multiplied by the number of courts reviewing the matter, there is no question that the legislature set the limit at $25,000. The high cost of litigation and other factors cited by amici (NWJP Br. at 10-11) are matters for the legislature.[1] In any particular case, a qualified party could assert that the statutory limit $25,000 limit does not adequately compensate them for their attorneys' fees and costs. However, that does not justify "interpreting" the statute to broaden or multiply a plainly stated cap on awards.[2]

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[1] Note that seemingly harsh limitations are inherent in the EAJA. For instance, RCW 4.84.340(3) generally limits attorneys' fees to $150 per hour, and RCW 4.84.350(2) – in addition to capping the award at $25,000 – requires that, if two or more qualified parties join in the action, the total award to all qualified parties may not exceed the $25,000 limitation.

[2] Amici incorrectly assert that this Court should liberally construe the twenty-five thousand dollar limitation in RCW 4.84.350(2), urging this Court to consider only the "remedial" nature of the EAJA. However, the EAJA – like the federal EAJA – represents a waiver of sovereign immunity of the state with respect to attorneys' fees and costs in some judicial review proceedings. *Ardestani v. INS*, 502 U.S. 129, 138-39 (1991). On that basis, a narrow construction is more appropriate. *Id.* at 137; *see also Lacey Nursing Ctr., Inc. v. Dept. of Revenue*, 128 Wn.2d 40, 53-54, 905 P.2d 338 (1995).

Furthermore, amici incorrectly characterize this case as a situation in which "an administrative agency uses its superior resources to prolong litigation into the appellate courts and each court finds the agency actions unreasonable." NWJP Br. at 11. Here, the EAJA award limit was met at the superior court level, and the issue of whether the agency's position was substantially justified was a close one – as indicated by two administrative bodies deciding differently on the license revocation and the Court of Appeals deciding that the agency's position was not substantially justified only after reconsideration. In any event, amici's characterization is not material to the correct statutory analysis.

Here, the strongest indication of legislative intent is the statutory language in RCW 4.84.350(2). If the Court examines the legislative record, however, it does not support the amici. As amicus WSTLA notes, the fiscal note before the legislature when it passed the EAJA described the $25,000 cap as cumulative, and there is no indication that any legislator took issue with that description. WSTLA Br. at 9 n.6. Amici cite, the governor's statements accompanying his partial veto of the EAJA as passed by the legislature in 1995 as inclusive, but these show that the

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The clear legislative purpose for the specific provision at issue was to limit awards to twenty-five thousand dollars. That purpose cannot be ignored in construing the limitation. Amici's reliance on *Sabastian v. Dept. of Labor and Industries*, 142 Wn.2d 280, 12 P.3d 594 (2000), (NWJP Br. at 12-13) is misplaced because the case did not interpret the EAJA, and the language of RCW 4.84.350(2) is not ambiguous.

new statutes represented a compromise solution allowing a maximum award amount per case. *See* NWJP Br. at 15.

Amicus WSTLA argues that 1997 legislative amendments that were vetoed by the governor support its view that the Act allows for "incremental fee awards, with a $25,000 limit available at each level of review." WSTLA Br. at 9 n.6. Other amicus interests assert that the legislative history surrounding the 1997 amendments "are susceptible to a variety of interpretations." NWJP Br. at 17. However, to the extent that the 1997 amendments shed light on the legislature's intent, they show that the legislature passed amendments that would have placed specific caps at each level of review, but those amendments were vetoed. The 1997 amendments would have increased the cap to "fifty thousand dollars for the fees and other expenses incurred in superior court, and fifty thousand dollars for the fees and other expenses incurred in each court of appeal to a maximum of seventy-five thousand dollars." Laws of Washington 1997, ch. 409 § 501. Despite the significance WSTLA places on the vetoed language, the 1997 amendments indicate that the legislature understood that it had to make a change in the statutory language if it wanted to apply specific limitations in RCW 4.84.350(2) at each stage of judicial review.

B. Amici are incorrect that the EAJA provides for an award up to $25,000 for attorneys' fees and costs, payable even when the party ultimately does not prevail.

Amici assert that a party that prevails and is reversed is still entitled to attorneys' fees and costs for winning below. For example, amicus curiae WSTLA argues that the Act provides a "free-standing award of fees and expenses, up to $25,000, at each level of judicial review." WSTLA Br. at 3. This argument essentially states that an agency has no appeal to the award, which presents significant concerns.

If the determination of whether a party prevails is independent and final at each level of review, a fee award under RCW 4.84.350(1) issued at superior court would not be reviewable by an appellate court. An agency would be deprived of any opportunity to contest the award, and there is no evidence that the legislature intended such a result. *State v. Railroad Comm'n of Washington*, 60 Wash. 218, 222, 110 P. 1075 (1910) (the right of appeal should not be denied in the absence of clear authority evidencing legislative intent to that effect), *City of Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007) (the right to appeal in all cases is expressly granted in Washington's constitution). Additionally, under WSTLA's interpretation, if a litigant is not successful at his or her judicial review case at the superior court level, but prevails in an appellate court, the litigant is only entitled to fees and costs incurred in the appeal, but not those incurred in superior court.

WSTLA argues that the language of RCW 4.84.360 supports the contention that an EAJA award is "free-standing." RCW 4.84.360 states:

> Fees and other expenses awarded under RCW 4.84.340 and 4.84.350 shall be paid by the agency over which the party prevails from operating funds appropriated to the agency within sixty days. Agencies paying fees and other expenses pursuant to RCW 4.84.340 and 4.84.350 shall report all payments to the office of financial management within five days of paying the fees and other expenses. Fees and other expenses awarded by the court shall be subject to the provisions of chapter 39.76 and shall be deemed payable on the date the court announces the award.

WSTLA labels this language "sui generis" (WSTLA Br. at 6), calling for a construction that "imposes on the agency involved a categorical and unyielding payment obligation, once an award of fees and expenses is announced by a court." WSTLA Br. at 3. It is not entirely clear how the provisions of chapter 39.76 RCW and RCW 4.84.360 interact. Awards "shall be paid . . . within 60 days," but are "subject to the provisions of chapter 39.76 RCW" (providing that payment on a written contract is timely mailed not later than 30 days after receipt) and are "deemed payable on the date the court announces the award." RCW 4.84.360. No reasonable reading of RCW 4.84.360 denies a party of the right to appeal.

II. CONCLUSION

No case in this Court has directly addressed whether the $25,000 limit is cumulative. Indeed, in the 13 years since the enactment of the EAJA, no published authority shows that a party sought to obtain an award beyond the $25,000 cap. However, recent cases interpreting the EAJA contradict the arguments of amici. *See Galvis v. Dept. of*

Transportation, 140 Wn. App. 693, 167 P.3d 584 (2007); *Western Washington Operating Engineers Apprenticeship Committee v. Washington State Apprenticeship and Training Council*, No. 36103-5-II, 2008 WL 1808818 (Wash. Ct. App. Apr. 22, 2008); *McFreeze Corp. v. Dept. of Revenue*, 102 Wn. App. 196, 6 P.3d 1187 (2000).

EAJA awards are limited to a total of $25,000 in a single judicial review proceeding at all levels of the court system. No authority directly contradicts this plain reading of RCW 4.84.350(2), and the legislative record supports it.

RESPECTFULLY SUBMITTED this 5th day of May, 2008.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct:

That on May 5, 2008, I arranged for service of Respondent's Response to Briefs of Amici Curiae to the Court and the parties to this action as follows:

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DATED at Olympia, Washington this 5th day of May, 2008.

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